

IN THE UNITED STATES DISTRICT COURT **FILED** *W3*  
FOR THE NORTHERN DISTRICT OF ALABAMA **APR 15 PM 2:25**

SOUTHERN DIVISION

U.S. DISTRICT COURT  
N.D. OF ALABAMA

UNITED STATES OF AMERICA,

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**FILED UNDER SEAL**

Case Number: CR 00-S-422-S

v.

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ERIC ROBERT RUDOLPH.

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**MOTION FILED UNDER SEAL**

*\*unsealed 5/25/04 per order doc # 223*

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UNITED STATES OF AMERICA,  
v.  
ERIC ROBERT RUDOLPH.

**FILED UNDER SEAL**  
Case Number: CR 00-S-422-S

COMES NOW Respondent Bureau of Alcohol, Tobacco, Firearms & Explosives and hereby petitions this Court for an Order quashing the subpoenas issued to employees of the Bureau of Alcohol, Tobacco, Firearms, & Explosives (BATF).

On advice of counsel in the Criminal Division, U.S. Department of Justice, BATF legal counsel notified prosecuting attorneys of the United States Attorney's Office for the Northern District of Alabama (USAO) that subpoenas were issued under seal to employees of BATF in this case and that a response is due by April 15, 2004. An Order of this court sealing the subpoenas prevented BATF legal counsel from sharing the contents of the subpoenas with the prosecution.

To the best of the undersigned counsel's knowledge, neither the prosecuting attorneys nor any employee of the United States

Attorney Office has seen or is aware of the testimony, documents, and/or information sought by the subpoenas under seal.

The undersigned civil assistant U. S. attorneys (civil AUSAs) advised counsel for the defendant that, absent the unsealing of the subpoenas, the process for granting authorization to the BATF employees to comply with the subpoenas could not go forward in light of applicable federal regulations, 28 C.F.R. 1621 et seq. The undersigned civil AUSAs engaged in further discussions to resolve this matter with defendant's counsel Judy Clark; however, counsel for the defendant have refused to agree to unsealing the subpoenas at issue and disclosing the contents to the prosecution. Therefore, the BATF moves to quash the subpoena(s) at issue.

#### SUMMARY OF ARGUMENT

The subpoenas should be quashed. The Supreme Court has long recognized that federal employees cannot be compelled to release information in violation of their department's regulations for releasing material to the public. The Department of Justice's regulations for releasing information to litigants allow only the attorneys "in charge" of the case - here, the prosecution - to authorize a release. 28 C.F.R. §16.23(a). In the instant case, however, the Court's seal order prevents BATF from sharing with the prosecution the contents of the subpoenas. As a result, the only persons empowered to authorize compliance with the defendant's subpoena are completely unaware (to undersigned counsel's

knowledge) of the contents of the subpoena(s). Therefore, because the government cannot comply with the subpoena without violating the Department of Justice's regulations, this Court should quash the subpoena.

#### LEGAL BACKGROUND

The "Housekeeping Statute," 5 U.S.C. § 301, provides in part that:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

5 U.S.C. §301 (emphasis added). Pursuant to this statute, many federal agencies have promulgated regulations that prescribe the manner in which their employees must respond to private litigants' subpoenas for official information. The validity of these regulations was explicitly upheld by the Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). As a result, the regulations are commonly known as "Touhy regulations."

The purpose of *Touhy* regulations is to centralize and regularize the decision making process for responding to subpoenas and other requests for information by private litigants. Because these requests for material from and testimony by government employees may drain agency resources, compromise an agency's impartiality, jeopardize privileged or confidential information, or

adversely affect other agencies or the public interest, the regulations are essential:

When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious.

*Touhy*, 340 U.S. at 468.

*Touhy* regulations serve the important function of ensuring uniform and well-considered responses to private litigants' requests for information—responses that will not cause injury to the government or the public, and that treat all requesters equally. To that end, the Department of Justice's *Touhy* regulations prescribe a precise method of arriving at decisions on whether to comply with litigants' requests for information. See 28 C.F.R. §§ 16.21-16.28. The regulations "set[] forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department." 28 C.F.R. §16.21(a). The regulations apply to all employees subject to the control of the Attorney General, including the BATF<sup>1</sup>. See 28 C.F.R. §16.21(b).

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<sup>1</sup> Effective January 24, 2003, the BATF and its employees were merged into the U.S. Department of Justice, and thereby became subject to the supervision, jurisdiction, or control of the Attorney General of the United States within the meaning of 28 C.F.R. §16.21(b).

In situations where the United States is a party to the litigation—as it is in this lawsuit—§16.23 provides the substantive operating procedure. The attorneys “in charge of the case or matter in which the United States is a party” are the officials empowered to authorize release of government material. 28 C.F.R. §16.23(a). In deciding whether to authorize release, the attorneys in charge “shall consider ... the factors set forth in §16.26(a) of this part,” and “shall not reveal or furnish any material ... when ... any of the factors specified in §16.26(b) exists.” 28 C.F.R. §16.23(a). Section 16.26(a) in turn includes considerations such as “[w]hether such disclosure is appropriate under the rules of procedure governing the case,” 28 C.F.R. §16.26(a)(1), and “[w]hether disclosure is appropriate under the relevant substantive law concerning privilege.” 28 C.F.R. §16.26(a)(2). And §16.26(b) prohibits release when “[d]isclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired.” 28 C.F.R. §16.26(b)(5).

#### ARGUMENT

**The Seal Order Prevents the Government from Deciding Whether to Release the Requested Material. Accordingly, the BATF Cannot Comply With the Subpoena.**

As explained above, the Department of Justice's *Touhy* regulations empower only the attorneys in charge of the case

to review the criteria in 28 C.F.R. §16.26(a) and §16.26(b) and decide whether to release the subpoenaed information. See 28 C.F.R. §16.23(a). After a decision whether to release material is made, that decision is reviewable under the Administrative Procedure Act. See, e.g., *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194, 1197 (11th Cir. 1991). Here, however, the government has not denied the defendant's request for information. Rather, the government is unable to make a decision on the request, because the federal officials tasked with that responsibility cannot be informed of the request. (Additionally, no other Department of Justice employee, including undersigned counsel, could possibly have the knowledge on which to base any decision, because anyone involved with the case is covered by the seal order.)

Significantly, neither the Housekeeping Statute (which authorizes the issuance of *Touhy* regulations) nor the Justice Department's *Touhy* regulations themselves provide a substantive reason for denying a request for information. That is, if the Department denies a litigant's request for information, it must support that denial with substantive legal argument, not simply with the discretion delegated by the statute or regulation. However, the Statute does allow an agency to choose who may disclose the information and the procedure to be followed for such disclosure. See 5 U.S.C. 301. That is precisely what the Department of Justice's *Touhy* regulations do; they identify which

federal officials shall make disclosure decisions. The Court cannot order the BATF to disregard the *Touhy* regulations: "*Touhy* is part of an unbroken line of authority which directly supports [the] contention that a federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations." *Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989) (cited with approval in *Moore*, 927 F.2d at 1197). The Department of Justice's *Touhy* regulations are constitutional. *United States v. Bizzard*, 674 F.2d 1382, 1387 (11<sup>th</sup> Cir. 1982) (considering 1980 version of regulations).

Accordingly, because the Court's seal order prevents the attorneys in charge of the case from knowing the contents of the subpoena and therefore from making the decision whether to release/disclose the subpoenaed material/information, the BATF is unable to comply with the defendant's request. This is not a denial of that request, it is an inability to process it. Therefore, because the BATF is unable to comply with the defendant's subpoenas, this Court should quash the subpoenas. If the defendant refiles his subpoenas without a seal order, the prosecution could then perform its duty under the Justice Department's *Touhy* regulations and decide whether to release the requested material.



Conclusion

For the foregoing reasons, this Court should grant the BATF's motion to quash the defendant's subpoenas.

Respectfully submitted,

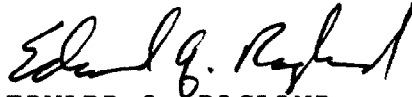
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon the following by mailing the same by facsimile transmission and by first class United States mail, properly addressed and postage prepaid, on this the 15<sup>th</sup> day of April, 2004:

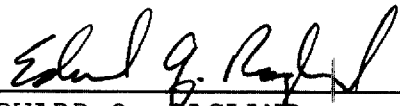
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